IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2006

CORAM :

THE HON□BLE MR. JUSTICE K.MOHAN RAM

C.M.A.No.727 of 1999

The Oriental Insurance Company Limited
75, Krishnan Street
Tiruvannamalai .. Appellant

Vs

1.Munuaswamy
2.Krishnaveni
3.Rambai .. Respondents

Appeal against the award and decree dated 29.07.1997 made in M.C.O.P.No.423 of 1995 on the file of the Motor Accidents Claims Tribunal, Sub Judge, Tiruvannamalai.

For Appellant : Mr.R.Sivakumar

For Respondents : Mr.K.Mohamed Ismail
for Mr.G.Rajan □ for R1 & R2

No appearance for R3

J U D G M E N T

Being aggrieved by the award dated 29.07.1997 made in M.C.O.P.No.423 of 1995 on the file of the Motor Accidents Claims Tribunal, Sub Judge, Tiruvannamalai, the insurer has filed the above appeal.

2. The parents of the deceased Muniammal who died in a motor accident that took place on 03.06.1995 while travelling in the lorry bearing Registration No. TNU 3942, filed M.C.O.P.No.423 of 1995 claiming a compensation of Rs.1,00,000/- (Rupees one lakh only) and the Tribunal though found the claimant to be entitled to get a sum of Rs.1,64,500/- as compensation, restricted the same only to a sum of Rs.1,00,000/- in view of the claim made by the claimants and accordingly awarded a sum of Rs.1,00,000/- as compensation.

3. The main contention of the insurer before the Tribunal was that the deceased was only a gratuitous passenger in the lorry and as such, the insurer is not liable to indemnify the owner of the lorry. But the Tribunal rejected the said contention and held that the insurer is also liable to pay compensation. Hence, the insurer has filed the above appeal.

4. The point for consideration in the above appeal is as to whether in a case of gratuitous passenger, the insurer is liable to indemnify the owner of the vehicle and pay the compensation amount to the

claimants. Since the said issue has now been finally decided by the Hon'ble Apex Court in a decision rendered in the case of National Insurance Company Limited Vs Baljit Kaur and others reported in 2004(2) SCC-1, the issue has to be held in favour of the insurer, the appellant herein. Accordingly, it is held that the appellant/insurer is not liable to indemnify the owner of the lorry in view of the accident.

5. However, the learned counsel for the respondents 1 and 2 by relying upon the very same judgment viz., 2004(2) SCC, page-1, submitted that the Apex Court itself has clarified that the legal decision enunciated in the said judgment shall have prospective effect only. The learned counsel further submitted that the Apex Court in the said decision in paragraph 21 has held as follows :

"... We therefore are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."

6. The learned counsel for the respondents 1 and 2 relied upon the Division Bench decision of this Court rendered in the case of United India Insurance Company Limited, Tiruvannamalai and another Vs. Selvam and others reported in 2006(1) M.L.J. 154, wherein, in paragraph 10 and 11, the Division Bench has observed as follows:

"10. Thus it is made clear that even though the position of law is in favour of the insurance company, that may have only prospective effect from the date of judgment of this case, viz. 6.1.2004 and for cases of erstwhile accidents, the position of law is that the insurance company shall have to pay and recover from the owner of the vehicle.

11. In this case also, the accident has taken place much prior to the above said judgment viz., 6.1.2004 and the accident was on 12/13.4.1999. Without filing any suit even by way of filing an execution petition, the insurance company is entitled to recover from the owner."

Hence, the learned counsel submitted that a similar order may be passed in this appeal also.

7. Per contra, learned counsel for the appellant relied upon the following decisions namely,
1. 2006 ACJ 144 (New India Assurance Co. Ltd. Vs
Shanthalakshmi and others)

2. 2005 volume-II ACJ (National Insurance Co. Ltd. Vs
Bommithi Subbhayamma and others)

3. 2006 AIR SCW 3227 (National Insurance Co. Ltd., Vs
Swaroopa and others)

and submitted that the Apex Court itself in the above said decisions has not directed the insurer to

pay the amount to the claimants, but had directed the claimants to recover the compensation amount from the owner of the vehicle and therefore, in this case also, the claimants would be permitted to recover the compensation amount only from the owner of the lorry.

8. I am unable to accept the said contention of the learned counsel for the appellant for the following reasons:

In all the above said three decisions relied upon by the learned counsel for the appellant, the Apex Court has only laid down the law that the insurer is not liable to indemnify the owner in respect of the claim arising out of the death of gratuitous passenger travelling in the motor vehicle and the Hon'ble Apex Court in all the three decisions has not considered the directions issued by the full Bench of the Apex Court in 2004(2) SCC-1. However the Division Bench of this Court in 2006 (1) MLJ 154 has followed the directions issued in 2004(2) SCC-1 and held that even though the position of law is in favour of the insurance company, that may have only prospective effect from the date of judgment of this case, [2004(2)SCC-1], viz., 6.1.2004 and for cases of erstwhile accidents, the position of law is that the insurance company shall have to pay and recover from the owner of the vehicle.

9. Therefore, I am bound by the decision of the Hon'ble Division Bench of this court. Further the case reported in 2004(2)SCC-1 was decided by three Hon'ble judges of the Apex Court, whereas, the other judgments relied upon by the learned counsel for the appellant are decided by two Hon'ble judges of the Apex Court. On that ground also, this Court has to follow the decision reported in 2004(2) SCC-1

10. The next question to be considered is as to whether, the Tribunal has granted just compensation. Learned counsel appearing for the respondents 1 and 2/claimants by relying upon the decisions of the Division Bench of this Court rendered in the case of the District Collector, Pudukkottai and another Vs Tmt.Neela Bai and others reported in 2000(1) MLJ 526 submitted that even though the respondents 1 and 2 /claimants have not filed any cross objections, this Court can enhance the compensation awarded to the claimants, particularly, in view of the fact that the Tribunal itself has assessed the compensation payable to the claimants at Rs.1,64,500/-. Though the Tribunal assessed the compensation payable at Rs.1,64,500/- as pointed out above, restricted the award to Rs.1,00,000/- only on the ground that the claimants have claimed only a sum of Rs.1,00,000/-. It is well settled that the Tribunal as well as this Court, while assessing the compensation payable under the Act shall fix the just compensation.

11. Learned counsel for the respondents 1 and 2 further submitted that the insurer, the appellant herein, has not questioned the quantum of compensation arrived at by the Tribunal in the grounds of appeal. The learned counsel for the appellant also fairly submits that the insurer/appellant herein has not questioned the quantum of compensation assessed by the Tribunal at Rs.1,64,500/-. In the said circumstances, the submission made by the learned counsel for the respondents 1 and 2 based on 2001(1) MLJ 526 merits acceptance. Therefore, this court is of the considered view that since the Tribunal itself has assessed the compensation at Rs.1,64,500/-, it is just and proper to enhance the compensation payable to the claimants 1 and 2 herein to Rs.1,64,500/-. However, in view of the judgment of the Apex Court reported in 2005(3) CTC 373 (Tamil Nadu State Transport Corporation Vs. S.Rajapriya and others) the insurer is liable to pay interest on the enhanced compensation only at the rate of 7.5% from the date of claim petition.

12 The learned counsel for the appellant/insurer submits that the interest awarded at 12% by the Tribunal has to be reduced to 7.5%, in view of the decision reported in 2005 (3) CTC 373(S.C.).

13 Per contra, the learned counsel for the respondents 1 and 2 submits that the Supreme Court in the judgment reported in 2006 AIR SCW 3227, taking note of the fact that the accident in that case took place 17 years back upheld 12% interest awarded by the Tribunal in that case also. However, it has to be pointed out that the Hon'ble Apex Court has held so the excise of the powers under Article 136 of the Constitution of India, whereas this Court has to follow the decision reported in 2005 (3) CTC page 373(S.C.). Accordingly, the interest awarded by the Tribunal at 12% is reduced to 7.5% per annum.

14. With the above modifications, the Civil Miscellaneous Appeal stands dismissed without costs. There shall be an award for a sum of Rs.1,64,500/- payable by the insurer with interest at 7.5% per annum on the said amount from the date of filing of the claim petition. The respondents 1 & 2/claimants shall pay the necessary court fee on the enhanced compensation amount of Rs.64,500/- within a period of three weeks from the date of receipt of a copy of this order. In this case it is made clear that without filing any suit by way of filing a execution petition, the insurance company is entitled to recover the amount paid by the insurer from the owner of the Motor vehicle involved in the accident and in that respect, the Tribunal shall follow the directions issued by the Hon'ble Apex Court in paragraph 21 of the judgment reported in 2004 (2)SCC-1.

rj

To

The Motor Accidents Claims Tribunal,
Sub Judge,
Tiruvannamalai

[PRV/7729]